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A

Ghasem Gharezadehsharbiani Hassan v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–185–07 OF 2012

AZAHAR MOHAMED, BALIA YUSOF WAHI AND ZAWAWI SALLEH JJCA

8 JULY 2014

C

Criminal Procedure — Appeal — Appeal against sentence and conviction — Accused person found with incriminating drugs at airport — 946g of methamphetamine — Denial of knowledge of drugs — Whether cautioned statement probable — Accused person convicted for charge and sentenced to death — Appeal to Court of Appeal against decision of High Court — Whether trial judge considered cautioned statement — Whether investigation carried out sufficiently — Whether conviction safe — Dangerous Drugs Act 1952 s 39B(1)(a)

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The appellant, an Iranian, had arrived at the Kuala Lumpur International Airport when he was stopped by the customs officer ('PW4'). PW4 then instructed the bag to be scanned and the scanned image showed something suspicious. The bag was not locked and bore the appellant's name. Upon inspection by PW5, there was a rubber plate which went around the inside wall

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of the bag. PW5 unscrewed the screws and when the plate was removed, crystal-like substances escaped from the holes where the screw were removed. PW5 made a small hole at one of the ends of the rubber plate and after knocking it, more crystal-like substances fell out. The substances were later confirmed to be 946g of methamphetamine. The appellant was subsequently

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charged in the High Court for drug trafficking, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. In his defence, the appellant did not dispute that he had carried the bag but he denied having any knowledge about the drugs found hidden inside as he was carrying the bag for one Masoud. According to the appellant, Masoud had instructed him to bring back

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computer parts to Malaysia. Satisfied that the prosecution had proven a case beyond reasonable doubt, the trial judge convicted the appellant for the offence and sentenced him to death. Hence, the present appeal. The main issue for determination was whether the trial judge had misdirected himself in his handling of the appellant's defence. The appellant submitted that the trial

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judge had failed to consider the defence sufficiently by failing to consider the cautioned statement of the appellant which contained the appellant's denial of any knowledge of the presence of the drugs.

Held, allowing the appeal:

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(1) It is the duty of the trial judge to consider and to analyse the cautioned statement that had been tendered as evidence by the appellant in support of his defence; that he had no prerequisite knowledge about the impugned drugs found in the bag. The trial judge must consider carefully whether the cautioned statement was capable of raising a reasonable doubt on the prosecution case. However, the trial judge had failed to consider and appreciate the cautioned statement which supported the appellant's oral testimony. The trial judge failed to consider and scrutinise the cautioned statement and to make his own findings as to why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole. This was a serious non-direction which amounted to a misdirection, warranting appellate intervention (see paras 13–14).

(2) The appellant's conviction was unsafe. In his cautioned statement, the appellant had furnished Masoud's telephone number to the investigating officer. The onus was on the prosecution to check whether the appellant's version of the facts, as they appeared in his cautioned statement, was true or false. The investigating officer ('PW6') conceded the importance of the telephone number in order to disprove the appellant's version. In spite of the importance of the telephone number, PW6 never investigated on Masoud and did not even make a call to the number given by the appellant on the excuse that 'saya terlepas pandang'. The conduct of PW6 was most unsatisfactory and unacceptable. As an investigating officer, PW6 has an onerous responsibility to investigate all aspects and fairly, including feature of the case which not only favours the prosecution but also the appellant. The appellant could not be penalised for lack of ingenuity in investigation by PW6 depriving him of the time honoured benefit of doubt (see paras 17 & 18).

[Bahasa Malaysia summary

Perayu, seorang berbangsa Iran, telah tiba di Kuala Lumpur International Airport apabila dia ditahan oleh pegawai kastam ('PW4'). PW4 kemudiannya mengarahkan beg diimbas dan imej imbasan menunjukkan sesuatu yang mencurigakan. Beg tersebut tidak dikunci dan mempunyai nama perayu. Atas pemeriksaan PW5, terdapat plat getah yang melingkungi dinding dalam beg tersebut. PW5 memuka skru dan apabila plat tersebut dialih, bahan seperti kristal terkeluar daripada lubang-lubang di mana skru dibuka. PW5 membuat lubang kecil di hujung plat getah tersebut dan selepas mengetuknya, lebih banyak bahan seperti kristal terkeluar. Bahan tersebut kemudiannya disahkan 946g methamphetamine. Perayu kemudiannya dituduh di Mahkamah Tinggi untuk mengedar dadah, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Dalam pembelaannya, perayu tidak mempertikaikan bahawa dia yang membawa beg tersebut tetapi menafikan apa-apa pengetahuan tentang dadah yang dijumpai tersembunyi di dalamnya kerana dia membawa

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beg tersebut untuk seorang bernama Masoud. Mengikut perayu, Masoud telah mengarahkan dia untuk membawa balik bahagian-bahagian komputer ke Malaysia. Berpuas hati bahawa pihak pendakwaan telah membuktikan kes melampaui keraguan munasabah, hakim perbicaraan mensabitkan perayu untuk kesalahan dan menjatuhkan hukuman mati ke atasnya. Maka rayuan ini. Isu utama untuk menentukan sama ada hakim perbicaraan telah tersalah arah dalam mengendalikan pembelaan perayu. Perayu berhujah bahawa hakim perbicaraan telah gagal untuk mempertimbangkan dengan sewajarnya pembelaan kerana gagal untuk mempertimbangkan pernyataan beramaran perayu yang mengandungi penafian perayu terhadap apa-apa pengetahuan mengenai kehadiran dadah tersebut.

Diputuskan, membenarkan rayuan:

(1) Adalah tugas hakim perbicaraan untuk mempertimbangkan dan untuk menganalisa pernyataan beramaran tersebut yang telah dimasukkan sebagai keterangan oleh perayu dalam menyokong pembelaannya; bahawa dia tidak mempunyai pengetahuan keperluan tentang dadah yang dipersoalkan di dalam beg tersebut. Hakim perbicaraan mesti mempertimbangkan secara teliti sama ada pernyataan beramaran boleh membangkitkan keraguan munasabah atas kes pihak pendakwaan. Walau bagaimanapun, hakim perbicaraan juga gagal untuk mempertimbangkan dan menilai pernyataan beramaran yang menyokong keterangan lisan perayu. Hakim perbicaraan gagal untuk mempertimbangkan dan meneliti pernyataan beramaran tersebut dan membuat dapatannya sendiri, mengapa, walaupun beliau tidak mempercayai pernyataan beramaran, ia tidak membangkitkan keraguan munasabah ke atas kes pihak pendakwaan secara keseluruhannya. Ini adalah salah arah serius yang menyebabkan salah arah dan mewajarkan campur tangan mahkamah rayuan (lihat perenggan 13–14).

(2) Sabitan perayu adalah tidak selamat. Dalam pernyataan beramaran, perayu telah mengemukakan nombor telefon Masoud kepada pegawai penyiasat. Beban adalah ke atas pihak pendakwaan untuk memeriksa sama ada versi fakta perayu, seperti yang terdapat dalam pernyataan beramarannya, adalah benar atau palsu. Pegawai penyiasat ('PW6') mengakui pentingnya nombor telefon agar dapat membuktikan versi perayu. Meskipun pentingnya nombor telefon tersebut, PW6 tidak pernah menyiasat Masoud dan langsung tidak membuat panggilan ke nombor yang diberikan oleh perayu atas alasan bahawa 'saya terlepas pandang'. Tingkah laku PW6 adalah amat tidak memuaskan dan tidak boleh diterima. Sebagai pegawai penyiasat, PW6 mempunyai tanggungjawab berat untuk menyiasat kesemua aspek dan secara adil, termasuk ciri kes yang mana bukan sahaja memihak pihak pendakwaan tetapi juga perayu. Perayu tidak boleh dihukum kerana tidak bijak dalam

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siasatan oleh PW6 yang menafikannya 'time honoured benefit of doubt' (lihat perenggan 17–18).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Ahmad Mukamal bin Abdul Wahab & Ors v PP [2014] 1 MLJ 865; [2013] 4 CLJ 949, CA (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 1135, SC (refd)
Jamuna Chaudhary & Ors v State of Bihar [1974] 3 SCC 774, SC (refd)
Lim Hock Boon v PP [2007] 1 MLJ 46, CA (refd)
Mraz v The Queen (1955) 93 CLR 493, HC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
Prasit Punyang v PP [2014] 4 MLJ 282; [2014] 1 MLRA, CA (refd)
Tan Ewe Huat v PP [2004] 1 MLJ 559; [2004] 1 CLJ 521, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 3, 182A(1)
Dangerous Drugs Act 1952 s 39B(1)(a), (2)

Appeal from: Criminal Trial No 45A-36 of 2001 (High Court, Shah Alam)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Tengku Intan Suraya Tengku Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] Ghasem Gharezadehsharbiani Hassan ('the appellant') was charged and tried before the Shah Alam High Court for trafficking in 946g of dangerous drugs, namely methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and punishable under s 39B(2) of the DDA.

[2] The offence was said to have been committed on 8 November 2010 at around 12.45am, at the Kuala Lumpur International Airport ('KLIA'). The

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dangerous drugs were found concealed in a bag the appellant was carrying at the time of his arrest.

[3] At the conclusion of the trial, the learned trial judge convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. The appellant appealed to this court. We heard his appeal, wherein at its conclusion we unanimously allowed it. As a result, the conviction was quashed and the sentence set aside. We now give our reasons.

[4] On the day and times in question, the appellant, an Iranian national, arrived at KLIA from Doha on Qatar Airways Flight 0622. Encik Mohd Zamri Shaffi ('PW4'), a customs officer was on duty at the Green Lane A. He stopped the appellant who had a bag with him. At that point of time, the appellant was on his way out. PW4 checked both his passport and his air ticket. PW4 instructed the bag to be scanned. The scanned image showed something suspicious. PW4 then asked the appellant to bring the bag to the examination counter. The bag was not locked. It bore the name of the appellant. PW4 then instructed the appellant to go to the customs office and called for assistance from the Narcotics Branch of the Customs.

[5] Not long after that, Superintendent Afzarizzal Abdul Wahab ('PW5') and his team arrived. The bag was again scanned, which showed suspicious image that appeared at the wall of the bag. At that moment, PW5 unzipped the bag and removed the clothings contained therein. There was a cloth lining inside the bag. PW5 unzipped the zip that runs around the lining and he observed that there was a rubber plate which goes round the inside wall of the bag. PW5 unscrewed the screws that supported the rubber plate. When the plate was removed, PW5 noticed that white crystal like substances escaped from the holes where the screws were removed. PW5 made a small hole at one of the ends of the rubber plate and knocked it. Some white crystal like substances fell out which were suspected to be methamphetamine. To remove the substances from the rubber plate, PW5 used a knife to cut it into two. The substances were successfully retrieved and were then put into a transparent plastic bag.

[6] Subsequently, the substances were sent to the Chemistry Department for chemical examination and analysis. The substances were confirmed by the chemist, Dr Vanitha Kunalan ('PW3'), to contain 946g of methamphetamine.

[7] On the basis of the prosecution evidence, which we have summarised above, the learned trial judge found a prima facie case against the appellant and ordered him to enter his defence. In essence, the appellant did not dispute that he had carried the bag containing the drugs. However, it was his defence that he had no knowledge at all about the drugs found hidden inside as he was merely

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carrying the bag for a person by the name of Masoud. In his evidence which was given under oath, the appellant explained in detail his defence: A

> On 07.11.2010 at about 11.15 pm, I was stopped at KLIA by a Customs Officer, PW4. Before 7.11.2010 I never visited Malaysia. On 7.11.2010 I took a flight from Doha to KLIA - Flight No. QR 622. After scanning I was asked to follow Customs Officer. After a short while a team of Customs Officers arrived. B
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> One of them is PW5. I was asked to scan my bag a second time. After that it (PI 6) was brought back to Customs Office and SP5 examined and unzipped it. It was not locked. SP5 took all the clothes out of P16. These clothes were mine. SP5 removed rubber strip encircling the side of inner side of P16. SP5 had to unscrew the strip (P19). The strip of P19 had to be cut to empty the contents of white substance. I saw SP5 cut it into two with the knife as seen. I did not put the white substance in P19. P16 is not my bag. C
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> Checked in P16 at Syria Airport, at Damascus. From Damascus I flew to Doha and then to KLIA. At Damascus Airport when I checked in P16, I did not know the bag contained drugs. In Customs Office I did not know white substance in P16 which was removed by PW5. I was shocked as I never saw a substance like this before. Started thinking about my wife and child. Was told that the substance was 'ice'. They said it was drugs. My reaction -1 was terrified and shocked. I thought of my wife and child. P16 was given to me by Mashood at Bus Station in Teheran. He gave P16 at Bus Station when he saw I had a small bag and he went to his car and brought P16 and gave it to me and I was to bring back from Malaysia some computer parts. Mashood asked me to bring back computer parts to Malaysia. I agreed to his request as I was a taxi driver and I wanted to change my car. When he gave me the offer I accepted it as Mashood wanted to use my green card to bring back computer parts. I was promised to be paid by Mashood 2 million Toman to bring back the computer parts and he paid me 500,000 Toman for my travelling expenses. D E F
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> After arrested by Customs, I gave a statement to Customs. D37.

[8] The main issue for determination in the instant appeal is whether the learned trial judge had misdirected himself in his handling of the defence of the appellant. G

[9] To begin with, we would like to highlight two important points, which have a very strong bearing on this appeal. First, we are very reluctant and hesitant to disturb a finding of fact made by the learned trial judge, who has audio-visual advantage which we do not have. Even so, it would be open to us to interfere with the finding made by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself. H I

[10] The second point is that for the proper determination of this appeal, it is important to bear in mind that in accordance with the provisions of s 3 of the

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Criminal Procedure Code ('CPC'), the appellant must be tried according to the provisions of the Code. In this regard, s 182A(1) of the CPC makes it patently clear that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. The CPC has advisedly used the term 'all the evidence'. We will say more about this later in this judgment.

[11] It is against the background of these two points, learned counsel submitted that the learned trial judge misdirected himself when he failed to consider sufficiently the defence of the appellant. It was argued that the learned trial judge failed to consider the cautioned statement of the appellant ('exh D37'). In exh D37, the appellant, among others, gave the following version:

(a) that he knew one Masoud, his taxi passenger, about one week before he left for Malaysia;

(b) that Masoud offered him to come to Malaysia to bring back computer parts and in consideration Masoud would pay the appellant 2m Toman;

(c) that the appellant agreed to the offer since he would be paid for bringing back computer parts from Malaysia as he would be changing a taxi too;

(d) that the appellant and Masoud left together and at the bus terminal, he was given a bag as the appellant's bag was not suitable for bringing computer parts;

(e) that the appellant then left for Turkey to Syria. The appellant stayed in Syria for 3–4 days and from Syria, he took a flight to Qatar and then to Malaysia;

(f) that the flight was sponsored by Masoud;

(g) that upon arrival at KLIA, his bag was scanned. He was then brought to the customs office where the bag was searched and the drugs were found;

(h) that the appellant said that he had no knowledge that the bag contained drugs and if he had known, he would not have brought it;

(i) that the appellant said that he planned to stay for two days in Malaysia at Palma Hotel at Ampang; and

(j) that the appellant also explained the telephone numbers behind the Fadak Travel & Tourism business cards. The telephone numbers were that of a friend in Syria and that of Masoud.

[12] The important point to make is this. In the cautioned statement, which was recorded on 10 November 2010, the appellant denied any knowledge of the presence of drugs inside the bag and he gave an explanation as to why he

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had no such knowledge. The contents of the cautioned statement represented the early disclosure of the defence of the appellant. The cautioned statement was given about three days after the appellant was arrested. Indeed, he had stated his version of events at a very early stage of the investigation against him. The contents of the cautioned statement were consistent with his oral evidence in court; hence the defence of the appellant was not something that was sprung for the first time in the defence case (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561).

[13] As we have said in the case of *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 1 MLRA, it is true that generally a self-serving or exculpatory cautioned statement is not in itself evidence of the truth asserted therein. But then, it is the duty of the learned trial judge to consider and to analyse the cautioned statement that has been tendered as evidence by the appellant in support of his defence; that he had no prerequisite knowledge about the impugned drugs found in the bag. In accordance with the provisions of s 182A(1) of the CPC, it is the bounden duty of the learned trial judge, at the conclusion of the trial, to consider the cautioned statement of the appellant and decide whether the prosecution has proved its case beyond reasonable doubt. The learned trial judge must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The learned trial judge has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the appellant) to reach a just result (see *Ahmad Mukamal bin Abdul Wahab & Ors v Public Prosecutor* [2014] 1 MLJ 865; [2013] 4 CLJ 949).

[14] However, the learned trial judge had failed to consider and appreciate the cautioned statement which supported the appellant's oral testimony. The learned trial judge failed to consider and scrutinise the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole (see *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577 and *Tan Ewe Huat v Public Prosecutor* [2004] 1 MLJ 559; [2004] 1 CLJ 521). In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 2 AMR 1135).

[15] Learned deputy public prosecutor ('DPP') urged us to invoke the proviso to s 60 of the Courts of Judicature Act 1964, which provides:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[16] We declined to invoke the proviso on the ground that on the facts of the

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instant case, we are unable to conclude that even if the learned trial judge were to direct himself correctly on the cautioned statement, he would have come to the same irresistible conclusion in that the appellant knew the offending drugs were hidden in the bag. Moreover, it is an established principle that the proviso is only to be invoked in exceptional circumstances (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381). In our judgment, there was nothing exceptional regarding the evidence of the present case against the appellant; there was no valid reason for us to invoke the proviso.

[17] There is another reason why we took the view that the appellant's conviction was unsafe. It will be recalled that it was his defence that he had no knowledge at all about the drugs found hidden inside the bag as he was merely carrying the bag for a person by the name of Masoud. As we have said earlier, in his cautioned statement, the appellant at a very early stage of the investigation had furnished Masoud's telephone number to the investigating officer. That being the case, the onus was on the prosecution to check whether the appellant's version of the facts, as they appeared in his cautioned statement, was true or false (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705). In this regard, the investigating officer, Muhamad llyas Queek Abdullah ('PW6') conceded the importance of the telephone number in order to disprove the appellant's version. This is what PW6 said in his evidence:

> Dalam D37: OKT ada beri nombor telefon Masoud. Saya tak telefon Masoud menggunakan nombor telefon itu. Nombor telefon itu penting kerana saya dapat pasti Masoud wujud dan apa OKT kata betul atau tidak.

[18] In spite of the importance of the telephone number, PW6 never investigated on Masoud. PW6 did not even make a call to the number given by the appellant on the excuse that 'saya terlepas pandang'. In our view, the conduct of PW6 is most unsatisfactory and unacceptable. As an investigating officer, PW6 has an onerous responsibility to investigate all aspects and fairly, including feature of the case which not only favours the prosecution but also the appellant. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth (see *Jamuna Chaudhary & Ors v State of Bihar* [1974] 3 Supreme Court Cases 774). The appellant cannot be penalised for lack of ingenuity in investigation by PW6 depriving him of the time honoured benefit of doubt (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137). This was never considered by the learned trial judge. Consequently, the appellant's right to a fair trial has been compromised, which has the effect of rendering the conviction very unsafe. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see *Mraz v The Queen* (1955) 93 CLR 493 quoted with approval in *Lim Hock*

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Boon v Public Prosecutor [2007] 1 MLJ 46).

[19] This appeal was, therefore, allowed and accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.

Appeal allowed.

Reported by Afiq Mohamad Noor